Supreme Court, U.S.
FILED
SEP 23 1991
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No. 91-132

In the Supreme Court of the United States

OCTOBER TERM, 1991

LLOYD LITTLEFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the tort law of Nevada and the Federal Tort Claims Act in determining that the United States was not liable for its failure to see that its independent contractor implemented safety precautions adequate to protect the latter's own employee from hazards of construction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 927 F.2d 1099. The opinion of the district court (Pet. App. 16a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1991. The court of appeals denied plaintiff's petition for rehearing on May 9, 1991. Pet. App. 15a. The petition for a writ of certiorari was filed on July 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, the Bureau of Reclamation of the Department of the Interior awarded Frontier-Kemper Constructors, Inc. (Frontier-Kemper), a contract for spillway modification and repair work at Hoover Dam. The contract also required Frontier-Kemper to remove the concrete and rock ("muck") produced by the excavation work. This material, which accumulated into a "muck pile" at a 50-degree angle in the spillway tunnel, was dislodged by various means and placed on trucks for transportation to a disposal site. Pet. App. 2a-5a.

The contract made Frontier-Kemper responsible for meeting safety and health standards promulgated by the Secretary of Labor under Section 107 of the Contract Work Hours and Safety Standards Act (the Act), 40 U.S.C. 333, and by the Bureau of Reclamation. If the Contracting Officer notified Frontier-Kemper of a violation of those standards, the contract required the latter to correct the situation "immediately," and authorized the former "to stop all or any part of the work" pending the corrective action. The United States and Frontier-Kemper agreed, however, that the failure of the Contracting Officer to stop work would "not relieve the Contractor of his responsibility for the safety of personnel and property." Pet. App. 17a-19a.

The parties also agreed to the terms of 29 C.F.R. 1926.650 (1985), subsection (i) of which called for "[d]aily inspections of excavations * * * by a competent person," and required that work cease, and necessary safety precautions be taken, when "evidence of possible cave-ins or slides [was] apparent." Finally, by including the terms of 29 C.F.R. 1926.3, the agreement reserved the Secretary of Labor's

"right of entry to any site of contract performance" for purposes of (a) inspecting and investigating compliance with the safety and health standards, and (b) carrying out the Secretary's duties under Section 107(b) of the Act. Pet. App. 19a.[1]

At a Joint Safety Policy Meeting on March 4, 1986, the United States and Frontier-Kemper discussed the potential danger of a muck slide. A government safety manager and two safety inspectors then analyzed that danger and brought it to the attention of Frontier-Kemper employees. Frontier-Kemper, however, took no corrective action, and the United States did not order cessation of the muck removal operation. Pet. App. 5a.

On April 18, 1986, petitioner—a frontier-Kemper employee—was standing next to a muck-removal truck when the entire muck pile dislodged and slid approximately 150 feet, causing petitioner serious injuries. Pet. App. 5a. Petitioner filed this lawsuit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674, seeking damages for the injuries suffered as a result of the muck slide. The United States filed a third-party action against Frontier-Kemper.

2. After trial, the district court found that the United States and Frontier-Kemper "knew of the

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[1] Section 107(b) in relevant part "authorize[s]" the Secretary of Labor to conduct investigations, hold hearings, and take further action to ensure compliance with the health and safety standards promulgated under the Act. 40 U.S.C. 333(b). If, after providing an opportunity to be heard, the Secretary determines noncompliance by a contractor, the contracting agency "shall have the right to cancel the contract, and to enter into other contracts for the completion of the contract work, charging any additional cost to the original contractor." 40 U.S.C. 333(b).

danger of a possible slide of the muckpile * * *, and negligently failed to take necessary precautions to safeguard [petitioner] from injury." Pet. App. 22a. The court noted that the government had reserved the right to inspect, and the authority to stop, Frontier-Kemper's operations, and concluded that it had negligently failed to do so. Pet. App. 23a-24a. While acknowledging that the mere reservation of such a *right* of inspection does not ordinarily impose a *duty* of inspection or control, the court reasoned that this general rule did not apply here because of the "special or peculiar risk" presented by the removal of the muck pile from a 50-degree angle. This, the court held as a matter of Nevada law,[2] invoked the Restatement (Second) of Torts §§ 413 and 416 (1965), which in turn imposed upon the government a nondelegable duty to take necessary precautions against the risk presented by the muck pile.[3] Pet. App. 24a-26a.

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[2] In an FTCA action, the district court's jurisdiction extends to "claims against the United States, for money damages, * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see 28 U.S.C. 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.").

[3] The Restatement (Second) of Torts § 413 (1965) applies when an employer hires an independent contractor "to do work which the employer should recognize as likely to create * * * a peculiar unreasonable risk of harm to others unless special precautions are taken." Section 413 provides that, in those circumstances, the employer will be liable for resulting physical harms if he or she "(a) fails to provide in the contract that the contractor shall take such precautions, or (b)

3. The court of appeals disagreed with the district court's interpretation of Nevada tort law, and reversed. Pet. App. 6a-7a, 14a. The court first observed that the district court had interpreted pertinent Nevada law based on federal cases, but "did not consider * * * *Sierra Pacific Power Co.* v. *Rinehart*, 665 P.2d 270 (Nev. 1983) (per curiam), in which the Nevada Supreme Court held that a landowner does *not* have a nondelegable duty to ensure the safety of a contractor's *employees*." Pet. App. 7a (emphasis added). As the court of appeals noted, Sections 413 and 416 of the Restatement are triggered by the existence of a peculiar risk "to others"—a term that different jurisdictions have variously construed to include, or exclude, a contractor's employees. Pet. App. 8a. As the court of appeals noted, however, the Nevada Supreme Court has explicitly embraced the latter view. Pet. App. 7a-9a.

The court of appeals next rejected petitioner's argument that the government was independently liable for not requiring Frontier-Kemper to enforce safety standards as required by the contract. Pet. App. 9a. The court held that the contract gave the United States the right to inspect, and stop work at, the worksite, but that it did "not provide that the government becomes an indemnitor if the work is not stopped and an employee of the contractor is injured." Pet. App. 10a. Indeed, because petitioner's

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fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

Under the Restatement (Second) of Torts § 416 (1965), an employer will be liable if its independent contractor does not exercise reasonable care to take "special precautions" against a "peculiar risk of physical harm to others," notwithstanding that the employer "has provided for such precautions in the contract or otherwise."

"right to recover in this action is limited to relief under Nevada *tort* law," the court concluded that "the respective rights and obligations of the parties to the construction agreement established under *contract* law, for our purposes here, are legally irrelevant." Pet. App. 11a (emphasis added). The court added that the government's contractual "right" to stop construction was not equivalent to a tort-law "obligation" to do so. *Ibid.*

Finally, the court of appeals observed that *Rinehart* had held that a landowner had no common law duty to take safety precautions against a dangerous condition "created during the course, and as a necessary consequence of," construction on the premises by an independent contractor. Pet. App. 11a (quoting *Sierra Pacific Power Co.* v. *Rinehart*, 99 Nev. 557, 560-561, 665 P.2d 270, 272-273 (1983)). In the court's view, the hazard arising from the muck pile was a necessary consequence of Frontier-Kemper's construction operations.[4] Pet. App. 11a. The court also determined (a) that the government "was in no better position than [Frontier-Kemper] to anticipate dangers and implement precautions," and (b) that "[t]here [was] no question of the competency or solvency of [Frontier-Kemper]."[5] *Ibid.* Hence, the court of appeals concluded that the district court had

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[4] The court relied on this consideration in distinguishing two decisions that had applied Nevada law to hold landowners liable for injuries sustained by employees of their independent contractors. Pet. App. 12a-13a (distinguishing *Karadanis* v. *Newcomb*, 101 Nev. 196, 698 P.2d 872 (1985); *McGarry* v. *United States*, 549 F.2d 587 (9th Cir. 1976), cert. denied, 434 U.S. 922 (1977)).

[5] Those considerations had informed the Nevada Supreme Court's decision in *Rinehart*, 99 Nev. at 561-563, 665 P.2d at 273-274, not to impose liability on an employer for injuries sustained by its independent contractor's employees.

erred in imposing liability on the government under Nevada law. Pet. App. 11a-12a.

ARGUMENT

The decision of the court of appeals, which turns on Nevada law, is correct as a matter of law and does not conflict with the decision of any other court of appeals. Hence, further review is unwarranted.

1. Petitioner argues that "[e]ven if Nevada *common law* prohibits an owner from retaining its obligation to ensure the safety of the contractor's employees on their land, the United States government has its own, self-imposed congressionally enacted duties that cannot be preempted by state law." Pet. 8. This claim, however, is without merit.

Petitioner first cites 29 C.F.R. 1926.3, which gives the Secretary of Labor or any authorized representative "a right of entry" for purposes of inspecting contract sites and "carry[ing] out the duties of the Secretary under Section 107(b) of the Act." Pet. 12. On its face, Section 1926.3 imposes no *duty* upon the Secretary, but merely reserves a right of entry. It is true, as petitioner notes, that Section 1926.3 makes reference to "duties" of the Secretary under Section 107(b) of the Contract Work Hours and Safety Standards Act. But Section 107(b) simply "authorize[s]" the Secretary to take such actions "as are deemed necessary to gain compliance with [Section 107] and any health or safety standard promulgated * * * under [Section 107(a)]." 40 U.S.C. 333(b). If the Secretary determines noncompliance, then the contracting agency "shall have the right" to cancel the contract. 40 U.S.C. 333(b). Thus, while Section 107(b) identifies "duties" of the Secretary in the broad sense of specifying a general area of statutory authority for which the Secretary is responsible, it

does not make evident, nor does petitioner point to, any particular statutory duty that the Secretary omitted to perform in this case.

Petitioner also contends that the government assumed a duty to conduct daily inspections, and stop work if necessary, by making the contract subject to the terms of 29 C.F.R. 1926.650 (1985). Pet. 11-12. As the court of appeals correctly observed, however, whatever obligations the government assumed in this regard, the contract "does not provide that the government becomes an indemnitor if the work is not stopped and an employee of the contractor is injured."[6] Pet. App. 10a.

Even if petitioner were correct that each of the foregoing provisions created a duty that the government breached in this case, that would not require the judgment of the court of appeals to be reversed. Petitioner's claim in this case was based solely on the Federal Tort Claims Act. In any event, no federal statutory or regulatory provision upon which petitioner relies expressly authorizes an action for money damages against the United States, or any other party, for the breach of any duty imposed thereunder. Moreover, petitioner has cited, and the government is aware of, no case holding that the Contract Work Hours and Safety Standards Act creates, or authorizes the Secretary to establish by regulation, an implied private right of action. Because "[t]he question of the existence of a statutory cause of action is * * * one of statutory construction," peti-

[6] Petitioner also cites 29 C.F.R. 1926.651(k), which calls for daily inspections of excavations by a competent person, and for further inspections after any "hazard increasing occurrence." Pet. 12. While petitioner contends that this provision imposed a duty upon the government, he nowhere explains how any such duty was breached.

tioner's "argument in favor of implication of a private right of action based on tort principles * * * is entirely misplaced." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979).

2. Petitioner also argues that the government's contract with Frontier-Kemper imposed a duty upon the government to maintain safe work conditions. Pet. 14-16. But aside from the previously discussed regulatory provisions to which the contract was made subject, petitioner relies solely upon contractual provisions that explicitly assign Frontier-Kemper, rather than the government, responsibility for compliance with safety and health standards. Pet. 14-15. Such provisions manifestly detract from, rather than advance, petitioner's contentions here.

Indeed, while petitioner includes in his petition a long block quotation setting forth subsections (a) through (d) of the contract's safety provisions, he omits to cite subsection (e). Pet. 14-15. Subsection (e) establishes the Contracting Officer's right to stop work, but adds a caveat that "[f]ailure of the Contracting Officer or his representative to order discontinuance of any or all of the Contractor's operations *shall not relieve the Contractor of his responsibility for the safety of personnel and property.*" Pet. App. 19a (emphasis added). This caveat amply confirms the court of appeals' conclusion that the contract does not make the United States an indemnitor if work is not stopped and injury results; rather, it explicitly leaves responsibility for such an injury squarely with Frontier-Kemper.

Even if petitioner were correct that the contract made him a third-party beneficiary of a promise by the government to assure compliance with safety standards, the court of appeals correctly held that such a claim has no relevance in an FTCA action.

Pet. App. 11a. To the extent that petitioner asserts a claim against the United States for breach of a contractual duty, and seeks recovery in excess of $10,000, his remedy is to seek redress in the Claims Court under the Tucker Act, 28 U.S.C. 1491(a)(1).

3. Petitioner argues that the court of appeals misapplied Nevada law, Pet. 16-20, but has not cited any special and important reason for granting review of this state-law issue. See Sup. Ct. R. 7. Moreover, petitioner's state-law claims are without merit. As the court of appeals determined, the Nevada Supreme Court's decision in *Rinehart* is controlling here, Pet. App. 7a-9a, 11a-14a, and petitioner suggests no persuasive ground for a contrary conclusion.[7]

4. Petitioner argues that the court of appeals' decision in this case conflicts with other Ninth Circuit decisions, and with decisions of other courts of appeals. Pet. 20-29. His contention, however, is misplaced.

a. A claim of an intercircuit conflict presents a matter for the court of appeals, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, none of the Ninth Circuit decisions cited by petitioner conflicts with this case.

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[7] Petitioner invokes *Karadanis* v. *Newcomb*, 101 Nev. 196, 698 P.2d 872 (1985), which affirmed the liability of a project owner where the owner failed to warn an invitee—its contractor's employee—of a hidden danger on the land, and the danger did not arise in the course of, and as a necessary consequence of, the contractor's project. Pet. 18-20. Petitioner, however, cites no authority for the principle that a large pile of concrete and rock positioned at a 50-degree angle should properly be regarded as a hidden danger. Moreover, the court of appeals was fully justified in holding that an accumulation of rock and concrete was a "necessary consequence" of the construction at issue here. Pet. App. 11a.

In *Camozzi* v. *Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 289 (9th Cir. 1989), the court of appeals held that the FTCA's discretionary function exception did not encompass allegations that the United States Postal Service had negligently exercised its duty to oversee the safety compliance of its independent contractor.[8] Because the district court had dismissed the suit based on the discretionary function exception, the *Camozzi* court had no occasion to address petitioner's substantive tort law claims, which in any case were brought under California, and not Nevada, law. *Id.* at 288. The court of appeals in this case invoked Nevada law, and not the discretionary function exception, in ruling against petitioner. *Camozzi* is therefore not even arguably in conflict with the present decision.

Nor is *McGarry* v. *United States*, 549 F.2d 587 (9th Cir. 1976), cert. denied, 434 U.S. 922 (1977). It is true that in *McGarry*, an FTCA action arising under Nevada law, the Ninth Circuit held that the Atomic Energy Commission had a duty to see that its independent contractor took proper safety precautions to protect its employees from the hazards of an extra-dangerous activity. 549 F.2d at 590-591. But the Nevada courts had not yet addressed the employer's duty of care under such circumstances, and the *McGarry* court looked for guidance to the Ninth Circuit's interpretation of California law. *Id.* at 590. Because the Nevada Supreme Court in *Rinehart* has since spoken authoritatively to the precise issue ad-

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[8] Under 28 U.S.C. 2680(a) the FTCA's waiver of sovereign immunity does not apply to "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, * * * or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty."

dressed in *McGarry*, the latter's reliance on California law must be regarded as lacking in continuing precedential value.

Finally, in *McCall* v. *United States Department of Energy*, 914 F.2d 191, 193 (1990), the Ninth Circuit applied Montana, and not Nevada, law.[9] Nevertheless, petitioner cites *McCall* for its holding that the United States sustained primary, and not vicarious, liability for its employees' negligent omission to ensure that an independent contractor observed proper safety precautions. Pet. 25 (citing *McCall*, 914 F.2d at 195). The court's holding, however, arose in a context inapposite to petitioner's claim here. The FTCA does not waive the immunity of the United States for lawsuits alleging vicarious liability based on the acts of independent contractors. See 28 U.S.C. 1346(b), 2671; see also *United States* v. *Orleans*, 425 U.S. 807, 813-814 (1976). *McCall* considered the applicability of that exception to the FTCA's waiver of immunity only after determining that Montana law imposed liability in the first place. 914 F.2d at 196-197. Because the court of appeals here determined that state law imposed *no* liability upon the United States, there was no occasion for the court ever to consider the applicability of that exception.

b. The intercircuit split alleged by petitioner (Pet. 26-29) also fails to withstand scrutiny. Several of the cases cited by petitioner held that the discretionary function exception to the FTCA's waiver of sovereign immunity did not apply where the claimant alleged that the United States had negligently

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[9] While *McCall* erroneously cited *McGarry* as a valid statement of Nevada law, 914 F.2d at 195, the tension between those dicta and the present decision provides no basis for this Court to exercise certiorari jurisdiction here.

failed to enforce safety standards. See *Irving* v. *United States*, 909 F.2d 598 (1st Cir. 1990); *Ayala* v. *Joy Manufacturing Co.*, 877 F.2d 846 (10th Cir. 1989); *Aslakson* v. *United States*, 790 F.2d 688, 693-694 (8th Cir. 1986); *McMichael* v. *United States*, 751 F.2d 303, 305-307 (8th Cir. 1985). Those decisions, however, present no conflict with the present case because, as noted, the court of appeals ruled against petitioner based on Nevada law, and not the discretionary function exception.

Similarly, petitioner cites various cases recognizing a duty on the part of the government to exercise reasonable care to prevent harms flowing from the inherently dangerous activities of its independent contractors, but every one of those decisions turns on the tort law of a State other than Nevada.[10] See *McMichael*, 751 F.2d at 308-310 (Arkansas law); *Emelwon, Inc.* v. *United States*, 391 F.2d 9, 11-13 (5th Cir.) (Florida law), cert. denied, 393 U.S. 841 (1968).

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[10] Indeed, in *Merklin* v. *United States*, 788 F.2d 172, 175-177 (1986), the Third Circuit predicted that the New Jersey Supreme Court would hold that the employer of an independent contractor engaged in inherently dangerous work owed no duty of care to the employees of its independent contractor. While *Merklin* recognized a claim alleging that the Atomic Energy Commission had supplied plaintiff with a chattel—radioactive material—having hidden dangerous properties that gave rise to a duty to warn, *id.* at 177, that holding under New Jersey law presents no conceivable conflict with the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45089